

Response to Call for Views on the Children (Scotland) Bill

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Our submission is based on our academic studies on children's participation in family law proceedings, particularly when their parents divorce or separate. These studies involve cross-national research and networks, empirical studies in Scotland, and legal and social-legal analysis. We have concentrated here on children's participation rights.

Key points

The Children (Scotland) Bill must be compliant with the UN Convention on the Rights of the Child (UNCRC). In order to achieve this the Bill must be revised to:

1. Provide entitlements for children's participation, based on the UNCRC. These include: all children having the right to express their views; a presumption that all children are capable to form a view; no age limit on the right to express views; children should have opportunity to be heard directly in proceedings; and information and support must be provided to children before, during and after proceedings.
2. Remove current wording in the Bill that, in contravention of the UNCRC, restricts children's rights to express their views based on a child's capability.
3. Provide systems of child-friendly remedy and redress should children's rights be breached. There is no robust data on how children's participation rights are implemented in Scottish courts. There is an urgent need for data to be gathered systematically by courts in order to monitor the implementation of children's rights.

In order to ensure that compliance with the UNCRC is achieved in practice, three wider issues need to be addressed in the Bill and the surrounding infrastructure. These are:

1. Enhanced systems and services being in place to enable children's participation, e.g. provision of child support/advocacy workers and providing information to children.
2. An understanding that the majority of cases of contested child contact that reach the courts will have concerns about domestic abuse and/or child welfare. Legislation, systems and services must be effective to deal with these complex circumstances. Mechanisms to facilitate children's participation in these circumstances are inadequate and the Bill does not sufficiently address this.
3. Radical reform is necessary, to shift the legal conceptualisation of contested child contact as an adult dispute about parental responsibilities and rights, to one where concerns about contact are squarely about and inclusive of children. Doing this would assist in realising *all* of children's human rights, including participation rights. Such reform would stop children's views being subsumed as evidence to determine welfare. It would enable children's participation rights to be recognised in themselves, as well as the intersections they have with children's welfare: the UN Committee on the Rights has itself wrestled with the articulations between a child's best interests and a child's participation rights¹, to ensure neither are lost. This requires more than the minor changes to the current legislation that are set out in this Bill.

¹ General Comment on Article 3 https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf and General Comment on Article 12 see <https://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf>

The Children (Scotland) Bill should be compliant with the UNCRC

1. One of the overarching policy objectives of the Bill is to ensure further compliance with the UNCRC in family court cases². This is urgent as the Scottish Government has made a commitment to incorporate the UNCRC into domestic legislation³. **However, the Children (Scotland) Bill as currently drafted is does not meet the requirements of the UNCRC.**
2. Currently, children's participation rights are too easily set aside because of adults' (often) untested concerns about children's capacity, vulnerability, and/ or parental influence⁴. It is not evident that the Bill will improve the status of children's participation rights nor will it increase children's opportunity to be heard directly in proceedings. Changes are therefore necessary to the Bill and accompanying secondary legislation, policy and services in order to be compatible with the UNCRC.
3. **As a minimum, the Bill must provide for children's entitlements that are set out in the General Comment on Article 12⁵, by the UN Committee on the Rights of the Child.** These are:
 - All children have the right to express their views (para 15)
 - All children should be presumed to have the capacity to form their own view (para 20)
 - There is no age limit on the right of the child to express their views (para 21)
 - Children need not have comprehensive knowledge to be considered capable (para 21)
 - Children experiencing difficulties must have opportunities to express their views (para 21)
 - Information is a precondition to a child's "clarified decisions", both in terms of: the matters, options and possible decisions to be taken and their consequences; and the conditions under which the child will be asked to express their views (para 25)
 - Wherever possible, children should be heard directly in proceedings (para 35)
4. **As a minimum, current language must be removed that limits a child's right to express a view based on their capability** (Sections 1(2)(1B), 1(4)(11ZB)(2), 1(4)(11ZB)(6)(2A), 2(2)(c), 2(3)(c), 3(2)(4), 15(2)(11E)(3)(a)).
5. The UN Committee on the Rights of the Child is clear that **all children** should be presumed to have the capacity to express views. It is the duty of the relevant individuals to enable that child to express their views in the manner most suitable to the child. **We have significant concerns that in practice the language of the Bill will leave younger children disenfranchised from their rights as set out under the UNCRC.** Our concerns are magnified by the Bill's financial memorandum, which makes no financial provision for an infrastructure to support young children to express their views on the basis that "the views of the youngest children would not be taken as they would not be capable of forming a view" (p.12). **We have further concerns that the rights of specific groups of children (e.g. children with learning difficulties) will be at risk under this drafting.**
6. **General Comment on Article 12 by the UN Committee on the Rights of the Child is clear that the rights of the child to express their views and the best interests of the child [article 3] are complementary, not in conflict, concluding that "there can be no correct application of article 3 if the components of article 12 are not respected" (para 74).** Concerns about a child's welfare too often lead to a child being disenfranchised, rather than consideration about how to address all aspects of children's human rights⁶. When children's views were

² [http://www.parliament.scot/S4_Bills/Children%20and%20Young%20People%20\(Scotland\)%20Bill/b27s4-introd-pm.pdf](http://www.parliament.scot/S4_Bills/Children%20and%20Young%20People%20(Scotland)%20Bill/b27s4-introd-pm.pdf), para 4

³ <https://www.gov.scot/publications/protecting-scotlands-future-governments-programme-scotland-2019-20/>

⁴ Morrison, F., Tisdall, E.K.M., and Callaghan, J.E.M. (2019) 'Manipulation and Domestic Abuse in Contested Contact – Threats to Children's Participation Rights', Family Court Review (accepted); Tisdall, E. K. M. (2018) 'Challenging competency and capacity? Due weight to children's views in family law proceedings', International Journal of Children's Rights, 26(1): 159–182.

⁵ <https://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf>

⁶ Tisdall, E. K. M. (2016). Subjects with agency? Children's participation in family law proceedings, Journal of Social Welfare and Family Law, 38:4, 362-379.

listened to in the course of parents' separation, regardless of the decision that was made about contact, the children were better able to accommodate their parental separation in the longer term⁷.

7. **To fulfil the requirements of the UNCRC, robust data are needed on how children's rights are implemented in court. There must be effective scrutiny of cases where a child's views are *not* included in their case.** This would allow for individual and collective identification of any lack of resources to support children's participation and it would provide evidence to improve practice.
8. **The General Comment on Article 12 directs that wherever possible children should be heard directly in proceedings.** In Scotland, children's views are largely mediated by adults, primarily by child welfare reporters⁸. The Children (Scotland) Bill is an opportunity to address this and achieve compliance with the UNCRC. **The Bill must strengthen its provisions so that children have the opportunity and are supported to communicate directly with court systems and the judiciary.** This requires the judiciary to be supported to hear directly from children. There is considerable interest in other countries for the judiciary to engage directly with children⁹. This requires support and preparation both for the child and for the judiciary, as well as the Court staff who would facilitate this taking place. Virtual connections (video or through secure social media channels) could provide other channels for children to be heard directly by courts.
9. **If children are not heard directly, the court and children must have confidence that the intermediary is transmitting the child's views accurately and fully, not providing *an interpretation* of the child's views.** Children and young people have repeatedly reported this as a problem under the current system¹⁰. The Bill's introduction of a register for child welfare reporters and curators ad litem has the potential to address some of the gaps in training and skills for these professionals (see below). More work must be done so that when children's views are mediated by an adult (e.g. child welfare reporter), safeguards are in place to ensure that children's views are reported accurately and directly to the court. These safeguards must involve and be accountable to children. **The Bill does not address concerns that children's views are at risk of not being transmitted accurately and fully to the court and instead are subject to intermediaries' interpretation.**

The Bill must provide opportunities for remedy and redress for children

10. The UN Committee on the Rights of the Child states in General Comment 5 that there must be access to effective remedy for rights to be meaningful¹¹. Scottish Government acknowledged that available remedies for breaches of rights were "vital" in their consultation on incorporating the UNCRC into domestic law¹². **The Bill must include child-friendly opportunities for remedy and redress when children's rights have been breached.**
11. **A key precondition for children's access to remedy is that they have sufficient child-friendly information.** The Family Justice Modernisation Strategy proposes that child friendly guidance be prepared for children who attend court to take part in a case about them or to give views to a sheriff or judge (para 6.21). We would suggest that

⁷ This refers to research undertaken in England (Kay-Flowers, S. (2019) Childhood experiences of separation and divorce: reflections from young adults Policy Press. Bristol. See also Fortin, J., Hunt, J. and Scanlan, L. (2012) Taking a longer view of contact: the perspectives of young adults who experience parental separation in their youth. <http://sro.sussex.ac.uk/id/eprint/44691/>

⁸ Mackay, K. (2013) Hearing children in contact disputes, CRFR Briefing, <https://www.era.lib.ed.ac.uk/bitstream/handle/1842/6557/briefing%2065.pdf;jsessionid=34DC22EC1503E28F8E5ACAC8F0DEF332?sequence=1>

⁹ Birnbaum, R. and Bala, N. (2010) Judicial Interviews with Children in Custody and Access Cases: Comparing Experiences in Ontario and Ohio, *International Journal of Law, Policy and the Family* 24(3): 300–337

¹⁰ Morrison, F. (2014) Children, Contact and Domestic Abuse, Unpublished Doctoral Thesis, University of Edinburgh

¹¹ https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fGC%2f2003%2f5&Lang=en, para 24

¹² <https://www.gov.scot/publications/childrens-rights-consultation-incorporating-uncrc-rights-child-domestic-law-scotland/pages/6/>

this needs to be wider, to cover a child's right to participate in a manner suitable to them and options if they were unhappy with how this right is being provided for. Of particular concern in the Bill are the exemptions in section 15 (2)(11E) (1) and (3) whereby the Court may decide not to provide information to the child on decisions that are made about them. The child must be provided with sufficient, child-friendly information to understand the decision that has been made about matters that affect them, and specifically about how their views have been considered in the decision making. This feedback acts both to guarantee the child's right to be listened to seriously and enables them to take further action where their rights have been denied. **The Bill text must be amended to ensure that the explanation to the child includes information on how the child's views have been considered. It must be revised to ensure that any exemptions to the duty to provide an explanation to the child are narrowly drawn.**

12. Effective monitoring of the Bill's implementation is crucial to ensuring children's rights are being effectively provided for. This requires specific data to be gathered and published for monitoring, and a statutory requirement for reporting to be included in the Bill, as informed by that data. As a minimum that data should include:

- Numbers of contested S.11 cases where children's views were and were not facilitated to be provided to the Courts, and the reasons why those views were not facilitated in those rare cases.
- Information on the different mechanisms used to facilitate children's views, including where those views were expressed directly to the Court (this information is crucial to enable resource planning).
- Data on children's satisfaction both with the process by which they were enabled to exercise their rights in the Court process on matters which affect them and the outcome of the decision made.

The Bill must be supported by an adequate and independent infrastructure to facilitate children's participation

13. We are deeply concerned about the absence of any infrastructure for child advocacy in the Bill. The General Comment on Article 12 directs that when giving views in legal processes all children are entitled to:

- preparation
- information – including the conditions under which the child will be asked to express their views (e.g. who will have access to what the child says) and the matters, options and possible decisions to be taken
- an adequate and encouraging environment
- feedback to the child on the outcome and how the child's views were considered

14. In order to achieve this, a system of child advocacy is needed urgently, to ensure children receive independent information and advice, ongoing support and opportunities to develop trusting relationships with adults who can safeguard their participation rights. This is what children and young people repeatedly tell researchers they need¹³. While the Scottish Government proposed to "consider further" the introduction of a child support worker in the Family Law Modernisation Strategy (para 2.24), it is not clear whether, when and how this will be implemented.

Our response to specific questions asked by the Justice Committee:

(1) Voice of the child: Do you agree with the approach taken in the Bill to remove the presumption that a child aged 12 or over is of sufficient age and maturity to form a view? Do you agree that it should be left to the court to decide the most suitable way of obtaining a child's views? How do you think children should be given the opportunity to express their views? Are there other measures that you think should be in the Bill to ensure that the voice of the child is heard?

¹³ Children and Young People's Commissioner Scotland and Scottish Women's Aid (2017) Power up/ Power down <https://www.cypcs.org.uk/policy/past-work/power-up/power-down/>;

Yes, we agree with removing the presumption of 12 years, which has acted more as a 'bar' for children to be involved than a facilitator¹⁴. Removing it will assist with complying with the UNCRC, as stated above.

The presumption of age 12, however, is retained for a child to instruct a solicitor (Section 1 (11ZB)(3) and (4)). Again, we are concerned this will limit rather than facilitate children's participation rights. The age of 12 is a historical convention in Scottish law, but has poor basis as a threshold in empirical evidence¹⁵. Children's access to legal representation has already been seriously curtailed by changes in legal aid provision¹⁶. Instead, a reconsideration should be given to ensure children have access to legal support as needed.

Aside from concerns around practical issues for children accessing legal representation, there are concerns about how Courts view children's legal representation. Morrison, Tisdall and Callaghan report attempts by children to assert their participation rights and seek legal representation risk being viewed as evidence of parental manipulation⁴. Other examples have been reported of Courts having a negative view of a child exercising their participation rights with the support of a lawyer¹⁷. The Bill states that a child must be given the opportunity to express their views "in a manner suitable to the child" (Children (Scotland) Bill 1(4) (11ZB)(1)(a)). **Part of what may be suitable for an individual child may include legal representation. For the Bill to enable fully the range of mechanisms relevant to a child expressing their views, it must state the child's access to legal representation in positive terms and remove Section 1 (11ZB)(3) and (4).**

We would recommend removal of the exception of involving the child, when "the child is not capable of forming a view", as stated above.

As reviewed above, evidence suggests children's participation rights are not met because of inconsistency across courts and poor practice. While the Section 11ZB of Bill seeks to expand methods available for children's participation, it is unclear how this will be implemented. An infrastructure is urgently required to support children's participation, that involves: training for all those involved; ensuring a range of methods are routinely available to children, that children have some information about choice about the methods; and working with the courts so that these methods are acceptable and possible. **The Bill must address the current absence of an independent infrastructure to facilitate children's views (for the reasons set out above).**

(2) Child's best interests: To what extent does the Bill meet one of its key policy aims of ensuring that the best interests of the child are at the centre of contact and residence cases and Children's Hearings?

As the majority of contested child contact cases involve allegations of domestic abuse or others concerns about child welfare¹⁸, contested child contact would be more appropriately treated as child welfare concerns – rather than parental / adult disputes. These raise larger concerns, than can be contained by the Bill, about whether child contact disputes should be heard in a non-adversarial system closer to the children's hearing system.

At a minimum, this Bill should resolve definitions of 'abuse' with other legislation and be updated in line with the Domestic Abuse (Scotland) Act 2018 to include coercive control. We support the provision for special measures for those who have experienced domestic abuse.

¹⁴ Mackay, K. (2013) Hearing children in contact disputes, CRFR Briefing, <https://www.era.lib.ed.ac.uk/bitstream/handle/1842/6557/briefing%2065.pdf;jsessionid=34DC22EC1503E28F8E5ACAC8F0DEF332?sequence=1>

¹⁵ Tisdall, E. K. M. (2018) 'Challenging competency and capacity? Due weight to children's views in family law proceedings', International Journal of Children's Rights, 26(1): 159–182.

¹⁶ Due to the Advice and Assistance (Scotland) Amendment Regulations 2010 and the Civil Legal Aid (Scotland) Amendment Regulations 2010.

¹⁷ E.g. BvB 2011 SLT (ShCt) 225 and Henderson and Henderson 1997 Fam Lr 120.

¹⁸ CAFCASS & Women's Aid (2017) Allegations of domestic abuse in child contact cases, <https://www.cafcass.gov.uk/wp-content/uploads/2017/12/Allegations-of-domestic-abuse-in-child-contact-cases-2017.pdf>; Mackay, K. (2013) The treatment of the views of children in private law child contact disputes where there is a history of domestic abuse, Scotland's Commissioner for Children and Young People, <http://www.sccyp.org.uk/ufiles/views-of-children-and-domestic-abuse.pdf>

We support Children 1sts call for primary legislation to ensure that children's best interests are taken into account when the court is considering whether their own information should be disclosed. We support Scottish Women's Aid call for further extending the provisions for vulnerable witnesses. We agree with concerns raised about the proposed section 12(2) that this may detract from the centrality of the child's best interests"¹⁹.

(3) Child welfare reporters and curators ad litem: Do you agree that child welfare reporters and curators ad litem should be regulated? Do you have any views on how this should work in practice?

The Bill's proposed register for child welfare reporters and curators ad litem may potentially address gaps in training and skills for these professionals. However, to address children and young people's concerns about current practice, training and resources are required, so that child welfare reporters and curators ad litem spend sufficient time with children to build relationships and develop trust so that children are able to give their views to the court. Such roles need clarity about the professionals' responsibility to transmit, rather than translate, children's views to the court. We recommend that more robust measures are introduced to ensure the quality assurance of practice.

(5) Other requirements on the court: Do you agree that the court should ensure that certain decisions are explained to the child? Do you have any views on the provision in the Bill which would require the court to consider the risk to the child's welfare of any delay in the proceedings?

Yes, the court should have the responsibility to ensure that decisions are explained to the child. The UNCRC requires all decisions to be explained to the child, as they have the right to receive information (Article 13). We would remove the qualification of this right of the "child who would not be capable of understanding an explanation however given" and when "it is not in the best interests of the child to give an explanation" (Section 15(2)(11E)(3)(a) and (b)). For the arguments above, we suggest a presumption that all children are capable of understanding. It is in the child's best interests to have decisions communicated to them that impact on themselves, so the question is how to communicate appropriately rather than whether to do so.

(8) Enforcement of orders: The Bill would require the court to investigate the reasons for a person's failure to comply with a court's order relating to, for example, contact. Do you have any views on this approach? Are there any other options which should be included in the Bill to ensure orders are enforced?

Yes, we support the court investigating the person's failure to comply with a court order. This should include appropriately offering the child the right to express their views. Evidence shows that children are often central players in a parent's failure to comply, because of children's own concerns, requests and actions²⁰. Children and young people's participation rights need to be extended to these provisions of the Bill.

(9) Contact with siblings: Do you agree that local authorities should be required to promote contact between a child and any siblings or other people with whom the child has a sibling-like relationship?

Yes. However, it is a concern that this will not be extended to children who experience family disruption and are subject to S.11 orders. The child's best interests should remain the paramount consideration when promoting contact sibling contact.

(10) Family Justice Modernisation Strategy / issues not covered by the Bill: The Family Justice Modernisation Strategy, published alongside the Bill, sets out other actions the Scottish Government intends to take to improve the operation of family justice. It also sets out the reasons why certain areas that were previously consulted on by the Government are not being taken forward. Do you have any views on the actions set out in the Family Justice Modernisation Strategy? Are there issues which are currently not covered by the Bill which you think should be?

¹⁹ Gillmore, S. (2010) Shared Parenting: the law and the evidence (Part 2), Seen and Heard 20(1): 21-35.

²⁰ Morrison, F., Tisdall, E.K.M., and Callaghan, J.E.M. (2019) 'Manipulation and Domestic Abuse in Contested Contact – Threats to Children's Participation Rights', Family Court Review (accepted)

Most cases are settled out of court, in relation to parental responsibilities following parental separation and divorce. Ensuring that children and young people's rights are met outwith court procedures is thus required. As reviewed above, evidence suggests that good support, information and participation for children and young people leads to better accommodation and satisfaction as they grow older. To achieve this, a systematic approach is needed, including legal education in schools, child-friendly information being widely accessible, and children having access to advocacy and legal advice.

The Bill does not address the Child Support Worker, which would be key for this systematic approach. The Family Law Modernisation Strategy does and suggests its potential introduction in line with other advocacy roles. There is no clarity about whether, when and how this will be implemented. The strongest and most consistent request from children and young people in Scotland, who have been involved in contested contact proceedings, is to have a child support worker. Without addressing this now, children's participation throughout the legal process risks being dealt with inconsistently, on an ad hoc basis and thus marginalised. We recommend provision be put into primary legislation, with the ability to then link developments to other advocacy roles.

About the authors

This submission is underpinned by several research partnerships and projects:

- Children's Participation in Family Actions: Probing Compliance with Children's Human Rights. Morrison, Tisdall, with Clan Childlaw. Funded by the Scottish Government.
- Improving Justice in Child Contact. Tisdall, Friskney, with partners across Europe including Scottish Women's Aid. Funded by the Rights, Equality and Citizenship Programme (2014-2020) of the European Union.
- Preliminary Research Study into Child Contact Proceedings for Children Affected by Domestic Abuse. Morrison, Tisdall and Clan Childlaw. Funded by the Commissioner for Children and Young People in Scotland.

For further information about the above research and the broader research activities, see

<https://www.stir.ac.uk/about/faculties/social-sciences/our-research/research-areas/centre-for-child-wellbeing-and-protection/>

www.ed.ac.uk/education/childhood-and-youth-studies

www.ed.ac.uk/education/ijcc



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